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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

B5

FILE:

WAC 05 206 54212

Office: CALIFORNIA SERVICE CENTER Date: JUL 25 2006

IN RE:

Petitioner:

Beneficiary

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner is a dental office. It seeks to employ the beneficiary permanently in the United States as an endodontist pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence. While the petitioner has overcome the director's decision, we must remand the matter to the director to address the issue of whether the entity that filed the petition is the same entity that filed the application for labor certification on which the petition is based or merely a partner of that entity.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

On the petition, the petitioner lists its name followed by "a.k.a. Premier Dental Specialists." The petitioner lists its Internal Revenue Tax number, also known as an Employer Identification Number (EIN), as [REDACTED]. The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750, filed by Premier Dental Specialists, was accepted for processing on April 25, 2002. The proffered wage as stated on the Form ETA 750 is \$2,000 per week, which amounts to \$104,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for Premier Dental Specialists as of November 2001.

On the petition, the petitioner claimed to have an establishment date in 1991, a gross annual income of \$1.5 million and nine employees. The petitioner, whose name on the petition includes the abbreviation "Inc.," submitted the U.S. Returns of Partnership Income, Form 1065, for Premier Dental Specialists, EIN [REDACTED] a different EIN than that listed on the petition, for 2002 and 2003. These returns reveal the following information:

	2002	2003
Net Loss	\$189,678	\$141,635
Doctor-Outside Services <sup>1</sup>	\$175,635	\$469,214
Current Assets	\$71,817	\$141,409
Current Liabilities	\$242,513	\$245,344
Net Current Liabilities	\$170,696	\$103,935

These returns, Schedule K-1, further reveal that the petitioner is a partner of Premier Dental Specialists with a one-third interest. Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on September 20, 2005, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage for 2004 and the beneficiary's Form W-2 Wage and Tax Statements for 2002 through "the present."

In response, the petitioner submitted its own Form 1120 U.S. Corporation Income Tax Return for 2004, filed as a personal services corporation. The return lists the EIN as [REDACTED], the same EIN listed on the petition. The return reflects the following information:

Net Income	\$16,039
Compensation of officers	\$697,600
Current Assets	\$162,973
Current Liabilities	\$353,382
Net current assets	(\$103,935)

Schedule E lists only one officer. The petitioner also submitted the beneficiary's Forms W-2 for 2002, 2003 and 2004. These forms reveal that Premier Dental Services, EIN [REDACTED] paid the beneficiary \$61,379.68 in 2002 and the petitioner, EIN [REDACTED], paid the beneficiary \$164,852.44 in 2003. The beneficiary also received wages from unrelated dental offices in 2002, 2003 and 2004.

Apparently without recognizing that the petitioner had submitted financial documentation for two different entities, the petitioner and Premier Dental Specialties, with two different EINs, the director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on December 15, 2005, denied the petition.

On appeal, counsel proceeds from the presumption that Premier Dental Services is the petitioner. As discussed above, however, the petitioner, although listing Premier Dental Services as its "a.k.a." is merely a partner of Premiere Dental Services, which has a different EIN than the one listed on the petition. Counsel asserts that Premier Dental Services (1) had sufficient assets after depreciation (2) had sufficient proceeds, removed by the partners for "outside services," (3) could rely on the finances of its

<sup>1</sup> These amounts are listed on Statement 2 for Schedule A, Line 5.

corporate partner, the petitioner, and (4) paid the beneficiary in 2002. The petitioner submits its own tax returns for 2002, reflecting \$17,220 in net income, \$381,287 in compensation of officers and \$39,136 in net current assets. The petitioner also submits Premier Dental Services' tax return for 2004 reflecting a net loss and negative net current assets. As with the other partnership returns, the 2004 returns shows significant funds, \$358,772, deducted as "Other deductions," but the attached statement is not included so we cannot determine how much of these funds are "Doctor-Outside Services." Counsel asserts that these funds were withdrawn and split among the three partners, as reflected on the Schedules K. The schedules K-1 in all years, however, reflect no income to the partners.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner paid the beneficiary more than the proffered wage in 2003, but did not employ and pay the beneficiary any wages in any other year. Even if we considered the \$61,379.68 Premier Dental Specialties paid to the beneficiary in 2002, the petitioner would need to establish the ability to pay the difference between those wages and the proffered wage, \$42,620.32.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, counsel's argument that the petitioner's total assets less depreciation should have been considered in the determination of the ability to pay the proffered wage because the petitioner could have sold those assets to pay the proffered wage. Such depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities.

Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>2</sup> If the petitioner's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner paid the beneficiary more than the proffered wage in 2003. As such, it has established its ability to pay the proffered wage in that year. Thus, it remains to consider whether the petitioner has demonstrated the ability to pay the proffered wage in 2002 and 2004. The petitioner has not demonstrated that it paid any wages to the beneficiary during these years. In 2002, the petitioner shows a net income of only \$17,220, net current assets of only \$39,136 and has not, therefore, demonstrated the ability to pay the proffered wage or even the difference between the wages paid by Premier Dentist Specialties and the proffered wage out of its net income or net current assets. In 2004, the petitioner shows a net income of only \$16,039 and negative net current assets. Thus, the petitioner cannot demonstrate its ability to pay the proffered wage out of its net income or net current assets in that year either.

That said, the petitioner, a personal service corporation according to the tax returns, compensated its sole officer \$381,287 in 2002 and \$697,600 in 2004. Ordinarily, a petitioner cannot establish its ability to pay based on compensation already paid to officers of the company. Peculiarities in the tax code, however, create a unique circumstance for sole owner medical service corporations. The sole owner of the corporation is clearly not earning a subsistence wage, a reduction of which would impair the owner's own ability to earn a living. Thus, the petitioner has overcome the director's basis of denial.

As stated above, however, the petitioner submitted a labor certification filed by Premier Dental Specialties. While the petitioner lists that name as its "a.k.a." on the petition, the two entities are not one and the same. Specifically, Premier Dental Specialties is a partnership while the petitioner is a corporation and the two entities have different EINs. The director, however, did not raise this issue, characterizing all of the tax returns submitted as partnership returns despite the fact that the 2004 return in the record before the director was a corporate return. Therefore, this matter will be remanded for consideration of whether the petitioner is able to rely upon the labor certification submitted. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.

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<sup>2</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.